Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Review by Cross Telephone Company L.L.C. (SAC No. 431985) of Decision of the Universal Service Administrator	)	USAC Audit ID: HC2016BE031
	)	WC Docket No. 10-90
	)	

CROSS TELEPHONE COMPANY, L.L.C.'S REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

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September 3, 2019

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SUMMARY

Cross Telephone seeks review of USAC's Appeal Decision reaffirming Audit Report Finding No. 1 which concluded that expenses for the Company's purchase of DS1 transport service from its affiliate, MBO Video LLC ("MBO"), should have been excluded from the Company's High Cost Program ("HCP") reports and instead should have been reported as interexchange plant and related expenses. Based on the Auditor's recommendation in Audit Finding No. 1, USAC is seeking to recover $8,251,829 in High Cost support from Cross Telephone. Cross Telephone appealed the Audit Report to USAC and that appeal was denied on July 2, 2019 on the same basis as the original Audit Report. The Company now appeals the Appeal Decision from the USAC Administrator to the Commission and requests that the Commission reverse the Audit Report's findings for the reasons outlined below.

The Audit Report is wrong because it incorrectly treats Cross Telephone's expenses for the purchase of transport service from a third party as the cost for use of the company's own asset. The Auditor gets to its result by incorrectly equating Cross Telephone's purchase of service with an affiliate sale and lease-back transaction using a distorted interpretation of Rule 36.2(c)(2) and an inappropriate application of the FCC's decision in *Moultrie Independent Telephone Company.* The Auditor's Finding No. 1 also ignores both the terms of Cross Telephone's contract with MBO and the substance and structure of the actual transaction. USAC subsequently failed to address the core evidence in the Company's Audit Appeal – the QSI expert analysis report – and espoused an even broader rationale than the Auditor's that similarly contradicts the rules.

First, Cross Telephone only purchased DS1 transport services from its affiliate and did not engage in an affiliate sale and lease-back transaction – the basis for the *Moultrie* decision. Moreover, Commission Rule 36.2(c)(2), governs the separations treatment of a carrier's property rented to or from its affiliate and on its face is inapplicable.

Second, USAC erred in its Appeal Decision by failing to even address the third party expert study from QSI commissioned by Cross Telephone, which found that Audit Finding No. 1 is erroneous. Moreover, USAC's Appeal Decision appears to take a more extreme position than the Audit Report in asserting that if the cost is "substantial" there are no circumstances, consistent with Part 36 of the FCC's rules, where an agreement with an affiliate can be an expense. This interpretation is contrary to both Rule 36.2 and *Moultrie* and is incorrect.

Finally, even if the Commission found that Rule 36.2(c)(2) applied, USAC was aware from its 2009 audit of Cross Telephone's reporting of the DS1 transport services from MBO as expenses and did not express any disagreement with the reporting methodology—the same one now at issue. To reverse funding that Cross Telephone applied for in good faith for years after the 2009 audit is manifestly unfair. If this abrupt change in USAC's position is permitted, it must be applied on a prospective basis only.

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Cross Telephone Company, L.L.C. ("Cross Telephone" or the "Company"), by its attorneys and in accordance with sections 54.719(b), 54.720(a) and 54.722 of the Federal Communications Commission ("FCC" or "Commission") rules,[1] submits this Request for Review of the Final Audit Report ("Audit Report") issued by the Universal Service Administrative Company ("USAC") in the above-captioned matter.[2] As required by FCC rules, Cross Telephone filed an initial appeal of the Audit Report with USAC on January 4, 2019.[3]

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1 47 C.F.R. §§ 54.719(b), 54.720(a), and 54.722.

2 *See* Cross Telephone Company L.L.C., Performance Audit on Compliance with the Federal Universal Service Fund High Cost Support Mechanism Rules, USAC Audit ID HC2016BE031 (November 6, 2018) ("Audit Report") (conducted by Moss-Adams LLP (the "Auditor") on behalf of USAC), attached hereto as Attachment A to the USAC Appeal labeled herein as Exhibit 1.

3 *See* Cross Telephone Company, L.L.C., Request for Review of Decision of the Universal Service Administrator (Jan. 4, 2019) ("USAC Appeal"), incorporated by reference herein with all underlying attachments as Exhibit 1.

USAC denied Cross Telephone's request on July 2, 2019,[4] and this Request for Review is timely filed.[5]

Cross Telephone seeks review of USAC's Appeal Decision reaffirming Audit Report Finding No. 1 which concluded that expenses for the Company's purchase of DS1 transport service from its affiliate, MBO Video LLC ("MBO"), should have been excluded from the Company's High Cost Program ("HCP") reports and instead should have been reported as interexchange plant and related expenses. The Auditor gets this result by incorrectly equating Cross Telephone's purchase of service from MBO with an affiliate sale and lease-back transaction using a distorted interpretation of Rule 36.2(c)(2) and the FCC's decision in *Moultrie Independent Telephone Company.* [6] Previously, Cross Telephone purchased identical service from Southwestern Bell at a higher price and there was no objection. Now, USAC and the Auditor contend that such a purchase is no longer eligible for support simply because it was supplied by an affiliate. This approach requires a warped interpretation of the sale and lease-back rule and yields illogical results.

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4 *See* Letter from USAC to Denise Smith, Kelley Drye & Warren LLP (July 2, 2019) ("Appeal Decision") attached hereto as Exhibit 2.

5 *See* 47 C.F.R. §§ 54.719(b), 54.720(b). In accordance with the FCC's rules, the window for appeal is 60 days after denial which ends August 31, 2019, a Saturday, and the next business day is September 2, 2019, a national holiday. Thus, Cross Telephone timely files its appeal on the next working business day, September 3, 2019. *See also* 47 C.F.R. § 1.4(j).

6 *In re Moultrie Independent Telephone Company; Motion for Stay of Part 69.605(a) of the Commission's Rules and Petition for Declaratory Ruling; Request for Waiver of Part 36 of the Commission's Rules; Federal-State Joint Board on Universal Service*, 16 FCC Rcd 18242 (2001) ("Moultrie").

Furthermore, in its Appeal Decision, USAC did not fully consider the Company's appeal, failing to address the results of the expert study commissioned by Cross Telephone for the appeal.[7] The Commission should reverse USAC's Audit Finding No. 1 and its flawed reasoning and should not seek to recover any HCP funding associated with this Finding.

I. BACKGROUND AND STATEMENT OF ISSUES

A. Overview of Cross Telephone Company

Cross Telephone is a limited liability company formed under the laws of the State of Oklahoma and has a principal place of business located at 704 Third Avenue, Warner, OK 74469. Cross Telephone is a rate-of-return incumbent local exchange carrier ("ILEC") providing local exchange and other telephone services throughout the State of Oklahoma.[8] The Company's customer base includes a mix of business, residential, enterprise and government customers.[9] Cross Telephone serves approximately 6,000 access lines, predominantly in rural counties in Oklahoma. Cross Telephone receives support from the HCP to aid the Company in making

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7 Cross Telephone engaged the services of QSI Consulting, Inc. ("QSI") to review and provide an expert analysis regarding the Company's purchase of services from MBO and the appropriate regulatory classification of those service revenues. QSI is a respected and well-known company with a long history of expertise and experience in the telecommunications industry. The review was led by Warren Fischer, a certified public accountant and Chartered Global Management Accountant with more than 20 years of experience in the telecommunications industry. *See* Declaration of Warren Fischer in support of Cross Telephone's Request for Review of Decision of the Universal Service Administrator ("Fischer Declaration"), attached hereto as Attachment B to the USAC Appeal.

8 *See* Declaration of V. David Miller II, Cross Telephone Company L.L.C., ¶3 ("Miller Declaration"), attached hereto as Attachment E to the USAC Appeal.

9 *Id.*

communications service affordable to subscribers in its territory.[10] Cross Telephone provides exchange service to subscribers utilizing a mix of its own facilities and services purchased from other carriers.[11]

During the 2012 – 2016 time period covered by the Finding No. 1, Cross Telephone purchased DS1 transport services, between Warner, Oklahoma and an interexchange carrier POP in Tulsa, Oklahoma.[12] It purchased these transport services from MBO.[13] Cross Telephone did not own the facilities necessary to transport its traffic between Warner and Tulsa and, prior to purchasing DS1 transport service from MBO, the Company purchased similar DS1 transport services from other carriers such as Southwestern Bell Telephone (now AT&T).[14] In the late 1990s, MBO constructed a fiber network and used it to offer services to other carriers.[15] Cross Telephone subsequently began purchasing DS1 transport services from MBO and entered into a Master Services Agreement ("MSA") with MBO setting forth the terms and conditions governing the Company's purchase of the transport service.[16] The MSA made clear that Cross

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10 *Miller Declaration*, ¶4.

11 *Miller Declaration*, ¶3.

12 *Miller Declaration*, ¶5.

13 *Miller Declaration*, ¶6. As noted, MBO also serves other customers with DS1 and DS3 transport services, in addition to serving Cross Telephone.

14 *Miller Declaration*, ¶5.

15 *Miller Declaration*, ¶6. The MBO network was constructed without use of funds from Cross Telephone.

16 *Miller Declaration*, ¶7. *See also* MBO Master Service Agreement ("MBO MSA"), attached hereto as Attachment F to the USAC Appeal.

Telephone was purchasing services, not leasing facilities, from MBO and that Cross Telephone was not granted title to any of MBO's equipment and facilities in connection with purchase of the DS1 transport service.[17] MBO sold services to other customers and other carriers are receiving services using the same facilities from MBO.[18]

B. USAC Audit Report and Appeal Decision

By audit announcement letter dated July 7, 2016, USAC initiated an audit of Cross Telephone's compliance with the FCC's rules and regulations regarding the HCP.[19] The audit focused on universal service High Cost support disbursements to Cross Telephone for the year ending December 31, 2015.[20] On July 20, 2018, the Auditor issued its draft findings including an estimated monetary impact of Finding No. 1 on the Company's HCP disbursements for the years ended December 31, 2012, 2013, 2014 and 2016 (in addition to 2015).[21] Cross Telephone responded to the draft findings, which were included in the Audit Report sent to Cross Telephone on November 6, 2018.

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17 *Miller Declaration*, ¶7.

18 *Miller Declaration*, ¶6.

19 *See* Letter from Wayne M. Scott, USAC (July 7, 2016). *See also* Letter from Jarret Rea, CPA, Moss Adams, LLP to R. David Wright, General Manager, Cross Telephone Company (July 7, 2016).

20 *See* Letter from Jarret Rea, CPA, Moss Adams, LLP to R. David Wright, General Manager, Cross Telephone Company, at 2 (July 7, 2016).

21 Cross Telephone Company, Performance Audit on Compliance with the Federal Universal Service Fund High Cost Support Mechanism Rules, USAC Audit ID HC2016BE031, Draft Report at 1 (July 20, 2018).

In Finding No. 1, the Auditor concluded that Cross Telephone incorrectly included certain affiliate transaction expenses as circuit expenses in the Company's traffic studies and HCP filings.[22] The Audit Report stated that during the period of 2010-2014, Cross Telephone reported $11,512,510 of circuit expenses for DS1 transport service purchased from MBO.[23] Concluding that the DS1 transport service expenses were "substantial" and constituted "rent" expense for Cross Telephone's use of MBO's interexchange plant, the Auditor recommended the DS1 transport service expense be removed and rented interexchange plant expenses be included in the Company's HCP filings.[24] Based on the Auditor's recommendation in Audit Finding No. 1, USAC is seeking to recover $8,251,829 in High Cost support from Cross Telephone.[25]

On January 4, 2019, Cross Telephone appealed the Audit Report to USAC and that appeal was denied on July 2, 2019 on the same basis as the original Audit Report. The Company now appeals the Appeal Decision from the USAC Administrator to the Commission in accordance with section 54.722 (a). The Commission's rules require it to review, *de novo*, any request for review of a decision of the USAC Administrator.[26] Unlike appellate review of FCC decisions, no deference is due to USAC or its conclusions in the underlying audit. The Commission has stated repeatedly that USAC is authorized only to act as an administrator of the

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22 Audit Report at 12.

23 Audit Report at 12.

24 Audit Report at 12.

25 Audit Report at 3.

26 *See* 47 C.F.R. § 54.723.

Universal Service Fund program. USAC is not permitted to exercise discretion or make novel interpretations of the Commission's rules. The Commission's rules caution that "[t]he Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."[27]

Fittingly, USAC rulings do not have the force of law and are not subject to deference. The Supreme Court, for example, held that *Chevron* deference does not apply where "there is no indication that Congress meant to delegate authority [to the agency to issue] rulings with the force of law."[28] This principle applies with equal – if not more – force to the actions of USAC, which is prohibited by FCC rules from engaging in policymaking of any kind. For that reason, the Commission's rules state that the Commission will review *de novo* the questions presented on appeal of USAC audit findings.[29]

C. <u>Points Addressed in FCC Appeal</u>

The Audit Report is wrong because it incorrectly treats Cross Telephone's expenses for the purchase of transport service from a third party as the cost for use of the company's own asset. The Auditor's Finding No. 1 is based on a misreading of Rule 36.2(c)(2), an inappropriate application of the Commission's decision in *Moultrie* to Cross Telephone's affiliate service purchase, and ignoring both the terms of Cross Telephone's contract with MBO

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27 47 C.F.R. § 54.702(c).

28 *United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001); *cf.* Earl Bonfield, State Administrative Policy Formulation and the Choice of Lawmaking Methodology, 42 Admin. L. Rev. 121, 134 (Spring 1990) (courts "need not give any deference to [agency interpretive rulemaking] because no discretion to create binding law on that subject was expressly or impliedly delegated to the agency").

29 47 C.F.R. § 54.723.

as well as the substance and structure of the actual transaction. USAC subsequently failed to address the core evidence in the Company's Audit Appeal – the QSI expert analysis report – and espoused an even broader rationale than the Auditor's that similarly contradicts the rules.

First, Cross Telephone only purchased DS1 transport services from its affiliate and did not engage in an affiliate sale and lease-back transaction – the basis for the *Moultrie* decision. QSI's review and analysis of Cross Telephone's DS1 transport service agreement with MBO provides new support confirming that the substance of the Company's actual transaction with MBO was indeed a purchase of service, not a lease of facilities, and was correctly reported as expenses.[30] Moreover, Commission Rule 36.2(c)(2), governs the separations treatment of a carrier's property rented to or from its affiliate[31] and on its face is inapplicable. QSI's analysis further provides new information regarding Rule 36.2(c)(2) and shows that any attempt to apply the rule to Cross Telephone's affiliate *service purchase* arrangement would require key rule terms be interpreted contrary to historical and current Commission definitions of those terms.

USAC erred in its Decision by failing to even address the QSI study. Cross Telephone appealed the initial Audit Report findings with USAC and included in the appeal a study it commissioned from a third party expert, which found that Audit Finding No. 1 is erroneous, USAC rejected the Audit Appeal without ever addressing (or even mentioning) the expert study.

Moreover, USAC's Appeal Decision appears to take a more extreme position than the Audit Report in asserting that if the cost is "substantial" there are no circumstances,

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30 *See Fischer Declaration passim.*

31 47 C.F.R. §36.2(c)(2).

consistent with Part 36 of the FCC's rules, where an agreement with an affiliate can be an expense. This interpretation is contrary to both Rule 36.2 and *Moultrie* and is incorrect. USAC's authority is administrative and it is prohibited from interpreting unclear provisions of Commission rules[32] so any attempt by the Auditor to interpret Rule 36.2(c)(2) or the *Moultrie* decision to apply to Cross Telephone's purchase of a service from its affiliate would be *ultra vires*.[33]

Finally, even if the Commission found that Rule 36.2(c)(2) applied, USAC was aware from its 2009 audit of Cross Telephone's reporting of the DS1 transport services from MBO as expenses.[34] USAC did not express any disagreement with Cross Telephone's reporting methodology at that time and the Company therefore reasonably relied on USAC's position and continued to utilize the reporting methodology that is now at issue. To reverse funding that Cross Telephone applied for in good faith for years after the 2009 audit is manifestly unfair. If this abrupt change in USAC's position is permitted, it must be applied on a prospective basis only.

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32 *See, e.g., Changes to the* Bd. *of Dirs. of the Nat'l Exch. Carrier Ass'n, Inc., Fed.-State Joint Bd. on Universal Serv.*, 13 FCC Rcd 25058, ¶16 (1998) ("*USAC Policy Order*"); Memorandum of Understanding between the Federal Communications Commission and the Universal Service Administrative Company, Section II (2016) ("USAC MOU"). *See also* 47 C.F.R. §54.702. ("The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission").

33 *See* 47 C.F.R. §54.702.

34 *See, e.g., Improper Payment Information Act (IPIA) Audit of the High Cost Program of Cross Tel Co*, HC-2009-FL-067, Follow-up Audit to HC-2007-220, USAC Management Response at 1 (Aug. 4, 2010) ("2009 Audit USAC Response"), attached hereto as Attachment C to the USAC Appeal.

II. USAC'S DECISION IS FLAWED BECAUSE IT FAILED TO FULLY CONSIDER CROSS TELEPHONE'S APPEAL

As explained above, under the Commission's rules, the Commission is to consider Cross Telephone's appeal *de novo*. Thus, USAC is not entitled to any deference to its appeal decision, and Cross Telephone does not bear a burden of proof with respect to the Appeal Decision. These considerations are even more important here, because USAC's Appeal Decision is fatally flawed.

In its USAC Appeal, Cross Telephone included a study commissioned by the Company from industry expert, QSI, which concluded that the Company had properly reported the transport service as expenses and the contract with MBO does not represent a sale and lease-back arrangement. The QSI study contained the key evidentiary support to substantiate Cross Telephone's arguments made during the audit. However, in its rejection of Cross Telephone's USAC Appeal, USAC reiterated the Audit Report's main rationales and analysis with no discussion of the QSI analysis. USAC's Appeal Decision makes no mention of the QSI study at all. It is not apparent, in reviewing the Appeal Decision, whether USAC even considered the information at all. For this reason, Cross Telephone asks the Commission to disregard the USAC Appeal Decision in its entirety and to consider *de novo* the arguments made in Cross Telephone's January 4, 2019 USAC Appeal, including the QSI study. Cross Telephone's January 4, 2019 USAC Appeal is attached as Exhibit 1 to this pleading and is incorporated herein by reference.[35] In the remainder of this appeal, for the Commission's convenience, Cross

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35 *See supra* note 3.

Telephone summarizes the arguments that it made in the USAC Appeal. Cross Telephone refers the Commission to the USAC Appeal for more detail regarding these arguments.

III. CROSS TELEPHONE'S PURCHASE OF TRANSPORT SERVICES IS AN EXPENSE AND WAS REPORTED CONSISTENT WITH PART 36

A. Application of the *Moultrie* Decision and Commission Rule 36.2(c)(2) to Cross Telephone's Affiliate Transport Service Purchase Requires an Unreasonably Expansive Reading of the Rule and of *Moultrie*

The *Moultrie* decision reflects the Commission's decision regarding a fact-specific, property sale and lease-back affiliate transaction arrangement. Similarly, Commission Rule 36.2(c)(2) addresses the treatment of a carrier's property rental to or from an affiliate. Both *Moultrie* and Rule 36.2(c)(2) address affiliate transactions that differ substantively and significantly from Cross Telephone's affiliate service purchase arrangement.

1. *Cross Telephone's purchase of DS1 transport service is not a property sale and lease-back affiliate transaction therefore section 36.2 (c)(2) does not apply*

As noted above, Cross Telephone purchases DS1 transport service from MBO to transport traffic between the Company's switch in rural Warner, Oklahoma and an AT&T meet point in Tulsa, Oklahoma.[36] Cross Telephone's purchase of the DS1 transport service is essential for it to complete service from its rural customers and exchange traffic with AT&T and other Oklahoma carriers. In the past, Cross Telephone purchased the service from Southwestern Bell Telephone, an unaffiliated carrier.[37] Beginning in the late 1990s, MBO constructed a fiber

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36 *Miller Declaration*, ¶5.

37 *Id.*

facility, which Cross Telephone was not involved in and did not contribute funds towards,[38] and used it to offer services to other carriers.[39] Cross Telephone subsequently entered into a Master Services Agreement ("MSA") with MBO to purchase DS1 transport services, which made clear that Cross Telephone was purchasing services, not leasing facilities and that Cross Telephone had no title to any of MBO's equipment and facilities in connection with the purchased services.[40]

Cross Telephone does not now own, and has never owned, the facilities necessary to transport its traffic on the Warner-Tulsa route.[41] Thus, Cross Telephone could not, and did not, sell to MBO the assets used to provide the transport service that Cross Telephone currently purchases from MBO.[42] As a result, there was no "sale" of assets to an affiliate and therefore there was no "sale and lease-back" transaction between Cross Telephone and MBO.

Furthermore, QSI's comprehensive review of Commission Rule 36.2(c)(2), the rule cited to in the Auditor's Report, shows that Rule 36.2(c)(2) is *prima facie* inapplicable to Cross Telephone's purchase of DS1 transport services from MBO. QSI's assessment begins by noting that Commission Rule 36.2(c)(2), on its face, exclusively addresses the reporting of expenses for property rented to or from a carrier's affiliate.[43] The *Moultrie* decision explained

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38 *Miller Declaration,* ¶6.

39 *Miller Declaration*, ¶6.

40 *Miller Declaration*, ¶7. *See also* MBO MSA.

41 *Id.*

42 *Miller Declaration*, ¶7.

43 47 C.F.R. §36.2(c)(2) (emphasis added).

that Rule 36.2(c)(2) also applied to affiliate asset sale and lease-back transactions including the transaction at issue in *Moultrie*.[44] However, neither the rule nor the *Moultrie* decision state, or even suggest, that Rule 36.2(c)(2) applies to a carrier's *purchase of services* from its affiliate. Additionally, any attempt by USAC to interpret the rule more broadly, to encompass the Cross Telephone affiliate service purchase, requires an unreasonably expansive reading of the rule and would be an *ultra vires* interpretation of a Commission rule.[45]

2. *Moultrie does not apply to these facts*

The Auditor's Finding No. 1 relies heavily on the Commission's discussion in *Moultrie* regarding the potential separations distortion that can occur if a carrier is able to exclude basic plant costs from the carrier's cost study and include additional expenses.[46] However, the only similarities between Cross Telephone's case and *Moultrie* is that both are ILECs that receive HCP support. The Auditor's reliance on *Moultrie* is unfounded because the Commission's rationale in *Moultrie* focused on affiliate property sale and lease-back scenarios[47] which are not present in the Cross Telephone Audit.

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44 *Moultrie*, ¶1 (emphasis added).

45 *See* Audit Appeal, Sec. III.C.2, for more detailed discussion.

46 Audit Report at 22.

47 *Moultrie*, ¶12 ("If a company were to *sell and lease back* one of these "foundation blocks" of plant") (emphasis added); ¶13 ("If an incumbent were to s*ell large portions of its non-loop related plant to an affiliate, and then lease back those assets*") (emphasis added).

The Auditor states that Cross Telephone had "substantial rent expense"[48] and relies on a National Exchange Carrier Association ("NECA") discussion applicable to "Operating Lease Expenses and Capital Leases."[49] The Audit Report does not, however, define the terms "lease" or "rent" nor does the Auditor attempt to apply any definition of these critical terms to the facts of Cross Telephone's service purchase. Moreover, QSI's review and analysis of the MSA demonstrates that the Company undoubtedly was purchasing a service, not leasing property from MBO.[50] QSI notes that the MSA explicitly denies a conveyance of any rights and uses the term "services" throughout the document.[51] In addition, in its analysis, QSI explains that the monthly fluctuation in Cross Telephone's volume of DS1 transport service is more common in service purchases and less common in lease arrangements.[52] These findings further support the Company's statement that it does not have a sale and lease-back arrangement and its expenses are not within the scope of the *Moultrie* decision.

3. *USAC's suggestion that all significant transactions with an affiliate are carrier facilities, rather than expenses, is wrong*

In the Appeal Decision, USAC appears at one point to push the interpretation of Rule 36.2(c) even further than the Auditor. USAC claims that the distinction between the purchase of services and the lease of facilities is "irrelevant" because Rule 36.2(c) applies to

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48 Audit Report at 14.

49 Audit Report at 23.

50 *See* Audit Appeal, Sec.III.C.1, for more detailed discussion.

51 *Fischer Declaration*, ¶23.

52 *See* Audit Appeal, 9-18, for more detailed discussion; *see also Fischer Declaration*, ¶¶19, 22.

both, so long as "the lease is between the regulated entity and its affiliate and is substantial in amount."[53]

This statement from USAC represents a significantly expanded interpretation compared to that of the Auditor and an interpretation that is clearly misrepresentative of the actual language in the rules. USAC appears to be asserting that the rules require that any expenses associated with a transaction with an affiliate, *regardless* of the nature of that transaction, must always be treated as interexchange plant and related expenses. Yet there is no support in Rule 36.2(c) for this interpretation.

Rule 36.2(c) is specifically about "*property* rented to affiliates"[54] not services. Other parts of Rule 36.2 address and use the term "services," which indicates a clear intent to distinguish the discussion of property from services in the broader rule. Therefore, if the FCC wanted the specific subsection of 36.2(c) to cover services it could have done so. Rule 36.2(c)(2) does not apply to Cross Telephone's affiliate service purchase unless key terms such as "rent" and "property" can be interpreted to include "purchase" and "service" as detailed in the QSI analysis.[55]

Thus, an interpretation consistent with the USAC Appeal Decision would further serve to warp the results of an affiliate arrangement against carriers receiving High Cost support,

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53 *See* Appeal Decision, 5 ("The distinction [between transport services and facilities] is irrelevant as Section 36.2(c) is applicable to the lease of property and the lease of a service, when [the] lease is between the regulated entity and its affiliate and is substantial in amount.").

54 47 C.F.R. § 36.2(c) (emphasis added).

55 *See* Audit Appeal, Sec.III.C.3, for more detailed discussion.

and would contradict the historical understanding of the Rule and the *Moultrie* decision. USAC's Appeal Decision is in error and the Commission should reverse the conclusions.

B. Even if Rule 36.2(c)(2) applied, Cross Telephone Reasonably Relied on the Prior USAC Audit and Retroactive Recovery Would Be Unfair

Cross Telephone has consistently reported its DS1 transport service payments to MBO as expenses for HCP support purposes, and the Company was the subject to a HCP Audit in 2009 that reviewed the same DS1 transport service purchases from MBO.[56] As a part of that audit which reviewed the Company's HCP reporting in 2004 and 2005, Cross Telephone provided information about its reporting methodology. Nonetheless, aside from noting a minor calculation error, the 2009 Audit did not identify any objections to Cross Telephone's methodology for reporting expenses for the DS1 transport service purchased from MBO.[57] The only statement regarding Cross Telephone's transport service purchase was included in a finding which also addressed unrelated regulated and non-regulated cost allocations and noted that Cross Telephone had miscounted the transport services purchased from MBO resulting in an understatement of the transport service expenses paid to its affiliate.[58]

This conclusion necessarily considered the expenses and how they were reported, but the 2009 audit did not challenge Cross Telephone's classification of the services from MBO as expenses for calculating High Cost support. This represents a tacit approval of the approach the Company was taking in reporting expenses. As a result, the Company reasonably relied on

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56 *Miller Declaration*, ¶¶9-10.

57 *Miller Declaration*, ¶9.

58 *See* Draft Cross Summary of Findings as of June 30, 2010 at 2, attached hereto as Attachment D to the USAC Appeal. *See also* 2009 Audit USAC Response at 1.

this approval and continued utilizing the same reporting methodology when it purchased the same DS1 transport services in subsequent years.

Finding No. 1 should be reversed but, if it is not, the Audit Finding must be applied on a prospective basis to avoid resulting in a manifest injustice to Cross Telephone. Applicable judicial and Commission precedent, require that this audit finding's unexpected reversal of USAC's position, on which Cross Telephone reasonably relied for several years, be applied on a prospective basis only. Applying Audit Finding No. 1 retroactively is unwarranted and requiring Cross Telephone to return its HCP support – support that Cross Telephone already has used to serve rural high-cost communities and that Cross Telephone cannot possibly recover from its service operations – would effect a manifest injustice.[59]

IV. CONCLUSION

For the foregoing reasons, Cross Telephone respectfully requests that the Commission reverse the Audit Report finding discussed above.

Respectfully submitted,

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September 3, 2019

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[59] *See* Audit Appeal, Sec. III.D for detailed discussion.

CERTIFICATE OF SERVICE

I, Avonne Bell, hereby certify that on September 3, 2019, pursuant to sections 1.47 and 54.721(c) of the Commission's rules, I have caused a copy of the foregoing Request for Review of Decision of the Universal Service Administrator filed with the FCC to be served (via email) on the following:

Universal Service Administrative Co.
Attn: High Cost Program
700 12th Street, NW, Suite 900
Washington, D.C. 20005
hcappeals@usac.org

Avonne Bell

Avonne Bell